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McGrath Fallacies: Remarks of William B. Ball

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REMARKS OF WILLIAM B. BALL*

Father Maida, you have made a very clear exposition of the governing role of Canon Law with respect to Church institutions and the relationship of the Church, itself, to these institutions.

Looking at our constitutional law, it is clear that the McGrath Thesis, which casts a cloud over rights of the Church, also casts a cloud over what I would broadly call the interests of the people of the Church in seeing that institutions which they have supported and believed in remain in service to the Church. The only point of my comment this morning is to raise certain specific areas, on the civil law side, for further exploration.

First, must the state's act of incorporation be so read as to oust Canon Law control—that is, to place the institution and its property outside of what many Catholics undoubtedly regard as the protective regime of Canon Law? Related to this is the further question of whether the act of incorporation may be so read. Here we may be at the edge of a serious problem pertaining to denial of the right of free exercise. It is apparent that any group, including a religious group, has a right to engage in works of health, education and welfare. To the religious group this may be an apostolate—or the exercise of a religious right. The state has a legitimate interest, however, in seeing that works of health, education and welfare are carried out for the common good. Therefore the state may minimally regulate. One of the commonest forms of regulation is incorporation. We need not explore here today why in many states, if not in all, incorporation of, for example, a hospital or a college is required. It is at least possible to consider, then, that, since incorporation is required by the state, as a condition precedent to carrying on the apostolate, that required act of incorporation must not be read as inimical to First Amendment liberties, but in a way that is consistent with them. It is thus possible to argue that the act of incorporation does nothing to oust Canon Law rights.

Another way of looking at this is in the light of the doctrine of unconstitutional conditions. The state may not condition the receipt of a public benefit upon the giving up of basic liberties of the recipient. Incorporation is a public benefit. The question must be raised as to whether the receipt of that benefit may be conditioned upon the giving up of the religious character of an institution with which it is clothed by virtue of Canon Law.

A third avenue of exploration is suggested by the Blue Hull case. If,

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under the governing law of the Church, a Catholic institution is hierarchical in nature, then it is the governing law of that Church which governs the institution. While a number of "Catholic" institutional administrators delight to hold themselves out as "secular" in their associations with their confreres from Vassar or Harvard, and in their anxiety to get public funds, they yet hold themselves out as "Catholic" in their desire to draw students from the market of Catholic folk throughout the land. I am not sure they can have it both ways, show two faces, affiliate and disaffiliate at will from a "Catholic" character. To the extent that they hold themselves out as "Catholic" they impliedly represent that they have some sort of membership in the hierarchical church, which is the Catholic Church. Thus it is possible to argue that they come within the Blue Hull doctrine.

Related to my foregoing third point is the question of what the religious order or Bishop can do, in the situation in which the board of trustees of the institution decides to sell the institution against the wishes of the order or the Bishop. Possibly the answer would be to go into court to seek an injunction, asserting (on the basis of facts which could doubtless be established) irreparable harm. Further it could be stated that the court could not approve of disposal of the property because it would then be deciding a question of Canon Law—that is, a religious question. Thus the complainants would ask the court to enjoin the sale of the property pending disposition of this religious question by the proper Church authority under the Blue Hull doctrine.

Fourth, there are some thoughts about *cy pres* that the McGrath Thesis brings to mind. McGrath says that the ownership of all Church institutions of health, education and welfare is in the public. There, upon sale of the property or dissolution of the corporation the proceeds go, by *cy pres*, to the public and with no necessary restriction to a religious institution similar in character. The result of this doctrine can be very startling. Under this thinking the assets of St. Francis Hospital, Pittsburgh (a truly Catholic hospital) could, upon dissolution, be directly handed over to Magee Womens Hospital, Pittsburgh (an abortion mill). In other words, the McGrath Thesis says that St. Francis must be regarded by the court as simply a public hospital, without any regard whatsoever for its religious character.

Fifth, the McGrath Thesis bothers me from the point of view of the law of trusts. Something must be wrong with a thesis which does such violence to the undoubted and provable intentions of so many millions of donors. For many a giver, it is the essence of his intention in making a gift to a Catholic hospital or college, that that institution will be something very, very different from a public institution which carries on a similar secular function. Historically, the Catholic donor has made his gift to a Catholic college precisely because it is radically different from a nonsectarian or public college. Otherwise he would have made his gift to the latter type institution.

It is my earnest suggestion that the very simplistic, lightly done McGrath paper now be carefully scrutinized by Catholic lawyers first in terms of its conformity to civil law principles and secondly in terms of its tremendous implications for the Church and Her people.